Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

No. 97-282

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1997

BETH ANN FARAGHER,

Petitioner,

v.

THE CITY OF BOCA RATON,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION IN SUPPORT OF RESPONDENT

Jan S. Amundson
Quentin Riegel
THE NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Penn. Ave., NW, Ste. 600
Washington, D.C. 20004

Leslie Miller
MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION, INC.
1525 Wilson Blvd., Ste. 900
Arlington, VA 22209

WILLIAM J. KILBERG
Counsel of Record
DOUGLAS R. COX
REBECCA A. WOMELDORF
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

BEST AVAILABLE COPY

37 pp

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE COURT SHOULD CLARIFY THE DISTINCTION BETWEEN HOSTILE ENVIRONMENT AND *QUID PRO QUO* CLAIMS UNDER TITLE VII 7

A. Title VII Caselaw Recognizes A Distinction Between Hostile Environment And *Quid Pro Quo* Harassment Claims 8

B. A Broad Definition Of *Quid Pro Quo* Harassment Vitiates *Meritor's* Conclusion That Title VII Does Not Impose "Automatic" Employer Liability For Hostile Environment Harassment 10

II. COURTS SHOULD DETERMINE EMPLOYER LIABILITY FOR HOSTILE ENVIRONMENT CLAIMS UNDER A COMMON LAW NEGLIGENCE STANDARD 15

A. Application Of A Negligence Standard Is Consistent With *Meritor's* Title VII Analysis 15

B. Imposing Employer Liability Based On Common Law Agency Principles Other Than Negligence Is Contrary To *Meritor* 19

III. APPLICATION OF A NEGLIGENCE STANDARD IS CONSISTENT WITH TITLE VII 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Andrade v. Mayfair Management, Inc., 88 F.3d 258 (4th Cir. 1996) 21

Baskerville v. Culligan Intern. Co., 50 F.3d 428 (7th Cir. 1995) 10

Bouton v. BMW of N. Am., Inc., 29 F.3d 103 (3d Cir. 1994) 11, 17, 22, 23

Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997) 11

Farley v. American Cast Iron Pipe Co., 115 F.3d 1548 (11th Cir. 1997) 17

Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995) .. 11, 18, 24

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) 8

Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232) 9, 12

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) 11

Jansen v. Packaging Corp. of Am., 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted sub nom. Burlington Indus. v. Ellerth*, 66 U.S.L.W. 3283 (U.S. Jan. 23, 1998) (No. 97-569) ..... passim

Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994) 11, 23

Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992) 11

Kilgore v. Thompson & Brock Management, Inc., 93 F.3d 752 (11th Cir. 1996) 18

Knabe v. Boury Corp., 114 F.3d 407 (3d Cir. 1997) 18

Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992) 11

Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988) 9

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) ..... passim

Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994) 11

Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) 11

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987) 11

Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990) 9

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) 11-12

United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) 29

Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989) 9

STATUTES

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 ..... 9, 27, 28

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. ..... passim

MISCELLANEOUS

Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* (1992) 12, 13, 23

David B. Oppenheimer, *Exacerbating The Exasperating: Title VII Liability Of Employers For Sexual Harassment Committed By Their Supervisors*, 81 Cornell L. Rev. 66 (1995) 22

Justin S. Weddle, *Note: Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty To Prevent A Hostile Workplace*, 95 Colum. L. Rev. 724 (1995) 22

The Bluebook: A Uniform System of Citation (16th ed. 1996).....20

Fact Finding Report: Commission On The Future Of Worker-Management Relations 29-45 (Dep't Labor/Dep't Com. May 1994) 15

Restatement (Second) of Agency § 219 ..... passim

INTEREST OF *AMICI CURIAE*[1]

Amicus the National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are located in every state and produce roughly 85 percent of U.S. manufactured goods. The NAM, through its member companies and affiliated associations, represents 185,000 businesses which employ more than 18 million individuals in every industrial sector.

Manufacturers Alliance for Productivity and Innovation, Inc. (the "Alliance") is a nonprofit research organization supported by some 450 manufacturing companies from a broad range of industries, including the leading companies in machinery and components, primary metals, automotive, pharmaceuticals, chemicals, oil and gas, electronics, precision instruments, telecommunications, computers, office systems, aerospace, and similar high-technology industries. Approximately one-quarter of the Fortune 500 industrial companies are members of the Alliance. A substantial proportion of Alliance members have sizable workforces of at least 5,000 employees and annual payrolls in excess of $100 million. The Alliance maintains two standing Human Resources Councils comprised of many member companies' senior human resources executives. A primary purpose of those Councils is to apprise

---

[1] No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici* and their counsel made any monetary contribution to its preparation or submission. Both parties consent to the filing of this brief.

members of current developments and issues concerning compliance with federal employment discrimination statutes.

The NAM, the Alliance, and their employer members have a vital interest in maintaining work environments that are free from harassment. *Amici* also have a substantial interest in ensuring that the standard of employer liability for the unauthorized acts of employees is interpreted consistently with the text of Title VII, and that the Court clarify the standard of employer liability so that needless litigation can be avoided. The NAM and the Alliance respectfully submit this *amici curiae* brief to bring to the Court an analysis that may not be presented by the parties.

STATEMENT

Petitioner Beth Ann Faragher worked as a lifeguard for the Parks and Recreation Department of respondent, the City of Boca Raton, Florida. Pet. App. 70a. Over the course of five years of intermittent employment as a lifeguard with the City, petitioner was subjected to uninvited and offensive touching by Bill Terry, a City employee who was one of petitioner's supervisors. Pet. App. 74a. Petitioner was also subjected to highly offensive gestures and comments by David Silverman, another lifeguard for the City who was senior to petitioner. Pet. App. 76a.

Petitioner never complained to the Parks and Recreation Department management, even when she resigned in June 1990 to attend law school. Pet. App. 81a. Petitioner did relate some of her experiences to one Robert Gordon, a co-worker who also happened to be senior to petitioner. Pet. App. 82a. As the district court found, petitioner did not talk to Gordon on a "subordinate to superior basis" but rather because she held Gordon in "high repute." Pet. App. 82a.

Subsequently, petitioner did not discourage her own sister from applying to work for the City as a lifeguard. Pet. App. 73a.

In April 1990, another lifeguard, Nancy Ewanchew, wrote a letter to the City's Director of Personnel complaining that she and other lifeguards had been sexually harassed by Terry and Silverman. Pet. App. 80a. The City investigated Ewanchew's complaint, determined that Terry and Silverman had engaged in inappropriate conduct, and promptly disciplined both men. Pet. App. 80a.

Despite the City's response to Ewanchew's complaint, in 1992 Ewanchew and petitioner -- who still had never complained to the City -- filed suit in the Southern District of Florida against the City of Boca Raton, Terry and Silverman. Pet. App. 69a. That suit included a claim against the City for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. *Id*. After a non-jury trial, the district court found the City liable to petitioner under Title VII and awarded petitioner nominal damages. Pet. App. 95a.[2] Although the district court specifically found that the City had no actual knowledge of the sexual harassment committed by Terry and Silverman, the court determined that liability could still be imputed to the City, on any one of three grounds: (1) that the conduct in question was sufficiently "pervasive" to impute "knowledge, or constructive knowledge" to the City; or (2) that Terry, Silverman and Gordon were "agents of the City" -- even though none of them was qualified as "higher

---

[2] Petitioner and Ewanchew pursued other claims against respondent, Terry and Silverman. Those claims are not at issue here and therefore are not discussed.

management" -- and that on that basis the City was vicariously liable to petitioner under Title VII even in the absence of actual or constructive knowledge of the unlawful conduct; or (3) that the City had knowledge of the harassment through Gordon and failed to take remedial action. Pet. App. 92a-93a.

All of the parties appealed, on a variety of grounds. A panel of the Eleventh Circuit held, *inter alia*, that none of the district court's grounds for imputing Title VII liability to the City was meritorious. Pet. App. 68a.

On rehearing, a majority of the *en banc* Eleventh Circuit affirmed the determination that there was no valid basis for imposing Title VII liability on the City of Boca Raton. The *en banc* court reasoned that because Terry and Silverman were not acting within the scope of their employment when they harassed petitioner (Pet. App. 12a), and because their harassment was not perpetrated by means of any agency relationship with the City, the City could not be vicariously liable for Terry's and Silverman's misconduct. Pet. App. 14a. The court rejected the district court's determination that the City knew or should have known of Terry and Silverman's actions. Pet. App. 15a-18a.

Judge Barkett (joined by Chief Judge Hatchett and Judge Kravitch) dissented, criticizing the *en banc* majority for adopting a view of traditional agency principles that essentially limited employer liability for supervisor harassment to situations where the employer "knew or should have known" of the hostile environment and failed to take appropriate action. Pet. App. 18a.

SUMMARY OF ARGUMENT

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court concluded that Title VII does not impose automatic liability on employers for "hostile environment" sexual harassment committed by employees with a supervisory rank. Consistent with *Meritor's* analysis of Title VII liability, the court below effectively -- and correctly -- concluded that employer liability for hostile environment harassment cannot be imposed absent a showing that the employer knew or should have known of the harassing conduct and failed to take appropriate action.

Although she fails to say so explicitly, petitioner in effect urges the Court to overturn *Meritor* and to hold that employers are almost always liable for a supervisor's harassment of another employee. Petitioner advocates employer liability under two theories that act as proxies for a regime of strict liability. First, petitioner maintains that employers bear liability whenever a plaintiff reasonably feared that "she would face retaliation if she resisted, objected or complained to others" about a supervisor's harassment. Brief for Petitioner ("Pet. Br.") 22. Second, based on the argument that a supervisor's knowledge is always automatically charged to the employer, Pet. Br. 30-31, petitioner suggests that employers always will have knowledge of harassment by a supervisor, meaning that employers will face liability for failing to address even unreported harassment by a supervisor of which the employer had no reason to be aware.

To the extent that petitioner's employer liability rationale does not result in "automatic" employer liability, it requires resolution by trial of every claim of Title VII harassment. *See* Pet. Br. 19, 22, 24.

Either result contradicts both Title VII and this Court's decision in *Meritor*, and either result would both greatly expand the scope of Title VII liability and substantially increase the volume of Title VII litigation.

The Court in *Meritor* began its analysis from the premise that Congress intended courts to use common law agency principles as a guide in determining the scope of employer liability under Title VII, but the Court explicitly rejected the notion that common law agency principles should be formalistically engrafted "in all their particulars" onto the statute. *Meritor*, 477 U.S. at 72. Consistent with this view of the appropriate role of agency principles in determining employer liability, the *Meritor* Court did not embark on a lengthy analysis of various common law theories of agency liability to determine the issue of employer liability before it. Instead, the Court examined several "plainly relevant" factors to determine whether the employer should face liability. The Court's examination of those "plainly relevant" factors -- such as the adequacy of the employer's sexual harassment policy and grievance procedures -- confirms that the reasonableness of the employer's actions in a given case is the correct guidepost for determining employer liability under Title VII. 477 U.S. at 72-73. Moreover, the Court suggested in *Meritor* that an employer can insulate itself from "hostile environment" liability if the employer fulfills its Title VII obligation to institute "procedures . . . calculated to encourage victims of harassment to come forward." *Meritor*, 477 U.S. at 73.

Unfortunately, like petitioner, many courts have misread *Meritor* and failed to follow *Meritor's* analytical approach to determine employer liability. Those courts have engaged in a convoluted analysis of agency concepts in a manner that vitiates *Meritor's*

categorical conclusion that Title VII does not contemplate automatic employer liability for environmental harassment.

This case provides the Court an opportunity to further illuminate the principles announced in *Meritor* and to simplify an area of the law that has become needlessly confused and complicated. In affirming the decision below, the Court should clarify two points. First, the Court should delimit the distinction between hostile environment and *quid pro quo* supervisory harassment claims to ensure that *Meritor's* prohibition on strict liability for hostile environment claims cannot be circumvented by artful pleading or imprecise judicial analysis. Second, the Court should confirm that Title VII does not impose liability on employers for hostile environment harassment absent a finding that the employer knew or should have known of the harassment and failed to take appropriate action. In this regard, the Court should underscore its observation in *Meritor* that employers that fulfill the role Congress envisioned for them under Title VII are not liable as a matter of law for the unauthorized misconduct of their employees.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE DISTINCTION BETWEEN HOSTILE ENVIRONMENT AND *QUID PRO QUO* CLAIMS UNDER TITLE VII

Like *Meritor*, this case involves a claim of "hostile environment" sexual harassment under Title VII of the Civil Rights Act of 1964. As explained below, Title VII caselaw has generally recognized a distinction between claims of "hostile environment" sexual harassment and claims of "*quid pro quo*" sexual harassment, and the classification of a sexual

harassment claim as one kind of claim or another usually determines the standard of employer liability. Accordingly, in articulating the standard governing employer liability for hostile environment claims, the Court should clarify the class of claims to which that standard applies.

A. Title VII Caselaw Recognizes A Distinction Between Hostile Environment And *Quid Pro Quo* Harassment Claims

Title VII makes it actionable for "an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). Title VII nowhere explicitly mentions "sexual harassment." It is well-established, however, that Title VII's prohibition on discrimination "because of . . . sex" encompasses a prohibition on sexual harassment in the workplace. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-22 (1993); *Meritor*, 477 U.S. at 64-65.

Similarly, although not evident from the statutory text, the distinction between "*quid pro quo*" and "hostile environment" sexual harassment is an accepted part of Title VII analysis. *See, e.g., Meritor,* 477 U.S. at 65; *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997) (en banc), *cert. granted sub nom. Burlington Indus. v. Ellerth*, 66 U.S.L.W. 3283 (U.S. Jan. 23, 1998) (No. 97-569). This Court held in *Meritor* that the EEOC's endorsement of a non-textual category of "hostile environment" sexual harassment not directly linked "to the grant or denial of an economic *quid pro quo*" was consistent with a "substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the

right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor*, 377 U.S. at 65 (citing 29 C.F.R. § 1604.11(a)).

Courts have determined that *quid pro quo* harassment occurs whenever "a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply." *Lipsett v. University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988); *see also Meritor*, 477 U.S. at 65; *Spencer v. General Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1990). Because of the coercive "bargain" element present in instances of *quid pro quo* harassment, this type of harassment always requires misconduct by a supervisor with the power to determine the terms or conditions of the plaintiff's employment. *See, e.g., Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Lipsett*, 864 F.2d at 897.

By contrast, hostile environment harassment encompasses a much broader range of circumstances that may result from the actions of any individual who intersects with the workplace, including co-workers, employees with supervisory rank and even nonemployees such as vendors and clients. *See, e.g., Harrison*, 112 F.3d at 1443; *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(e). This Court has held that, to fall within the ambit of Title VII, environmental harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and

create an abusive working environment." *Meritor*, 477 U.S. at 67 (internal quotations omitted).[3] But the appropriate scope of hostile environment claims has eluded courts. *See Jansen*, 123 F.3d at 501 ("courts have been hard pressed even to define" hostile environment harassment); *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430 (7th Cir. 1995) ("It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other."). This Court has essentially defined hostile environment harassment as a catch-all category including all "non *quid pro quo* . . . harassment [that] violates Title VII." *Meritor*, 477 U.S. at 65. Determining what is and is not a valid claim of *quid pro quo* harassment under Title VII thus directly affects the type of conduct subject to hostile environment analysis.

B. A Broad Definition Of *Quid Pro Quo* Harassment Vitiates *Meritor's* Conclusion That Title VII Does Not Impose "Automatic" Employer Liability For Hostile Environment Harassment

Appellate courts have had considerable difficulty defining the limits of *quid pro quo* sexual harassment claims. *Compare, e.g., Jansen*, 123 F.3d at 513-15, 559-60, 505 (separate opinions of Posner, C.J., and Manion & Kanne, JJ., concurring in part and dissenting in part) (concluding that an adverse job consequence is necessary to state a *quid pro quo* claim), *with Jansen*, 123 F.3d at 499 (Flaum, J., concurring) (concluding that "clear unfulfilled" or perceived threats of an adverse job action are sufficient to state a *quid pro quo* claim).

[3] As this Court has recognized, Title VII does not provide a remedy for "all workplace conduct that may be described as 'harassment.'" *Meritor*, 477 U.S. at 67.

Many courts have reserved the *quid pro quo* designation for claims involving an actual adverse job action. *See Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995) ("[A] supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute *quid pro quo* harassment."); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987). Other courts have applied the *quid pro quo* label expansively to include a "supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments," even if limited to "a single conversation." *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994); *see also Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987) (by "making or threatening to make decisions affecting the employment status of his subordinates," supervisor subjects his employer to strict liability) (citation omitted).

Despite the definitional uncertainty concerning the boundaries of *quid pro quo* claims, courts generally hold that employers are strictly liable for *quid pro quo* harassment. *Jansen*, 123 F.3d at 495; *Davis v. City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994); *Sauers*, 1 F.3d at 1127; *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992); *Steele v. Offshore Shipbuilding, Inc.*,

867 F.2d 1311, 1316 (11th Cir. 1989). "In cases involving *quid pro quo* harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct." *Harrison*, 112 F.3d at 1443.[4]

The likelihood that pleading an instance of workplace harassment as a *quid pro quo* claim could lead to strict liability for the employer underscores the need for the Court to clarify which harassment claims are not covered by the *quid pro quo* label. Left unresolved, the uncertainty surrounding the appropriate limitations of *quid pro quo* harassment claims threatens to impose strict liability for all harassment claims -- a result categorically rejected by the Court in *Meritor*. That danger is very real as "the *quid pro quo* concept, in its widest reach, could include any situation in which individuals must accept a gender-hostile environment in order to enjoy the tangible benefits of

---

[4] Although the EEOC in its Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner ("EEOC Br.") at 15 observes correctly that "the courts of appeals have generally agreed that an employer is liable when a supervisor engages in *quid pro quo* harassment," some jurists have rejected the imposition of "automatic" employer liability for *quid pro quo* harassment as social engineering unwarranted under Title VII, traditional agency principles, and this Court's decision in *Meritor*. *See, e.g.*, *Jansen*, 123 F.3d at 517 (Coffey, J., concurring in part and dissenting in part) (criticizing imposition of strict employer liability in Tile VII cases). In any event, because the case at bar involves a claim of hostile environment harassment, the Court need not consider here the appropriate standard for employer liability in a case of *quid pro quo* sexual harassment.

their jobs." Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* 8 (1992).[5]

The briefs submitted on behalf of petitioner demonstrate the ease with which essentially every hostile environment claim involving harassment by a low-level but nominally "supervisory" employee can qualify as a quasi-*quid pro quo* claim for which the employer may bear strict liability.[6] This analytical sleight of hand is accomplished by equating the archetype *quid pro quo* harassment claim -- in which a supervisory employee imposes an adverse job action based on the employee's response to the supervisor's sexual demands -- with a hostile environment perpetrated by a supervisory employee, who by nature of the supervisory role may be said to have "inherent leverage" over the employee that allows the supervisor to "rely on implicit understandings" to accomplish harassment. *See, e.g.*, EEOC Br. 9-10, 19-21, 24; Pet. Br. 24-26.

The Court should clarify that *quid pro quo* harassment encompasses at most a narrow and specific set of circumstances where a supervisor "brings about a significant alteration in the terms or conditions of his victim's employment" on account of sex. *Jansen*, 123

---

[5] The Court recently granted certiorari to consider the circumstances under which a claim of *quid pro quo* harassment may be stated under Title VII. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted sub nom. Burlington Indus. v. Ellerth*, 66 U.S.L.W. 3283 (U.S. Jan. 23, 1998) (No. 97-569).

[6] Petitioner virtually ignores the distinction between hostile environment and *quid pro quo* harassment claims, presumably because that analytical distinction is fatal to her expansive theory of employer liability.

F.3d at 512 (Posner, C.J., concurring in part and dissenting in part). Judge Posner describes these cases as cases in which a harassing supervisor uses his delegated authority and the company's machinery to accomplish a quantifiable "company act" in connection with the harassment – such as firing the victim, denying the victim a promotion, or transferring or demoting the victim. *Id.* Worded in traditional Title VII terminology, there must at a minimum be some concrete adverse job action for a plaintiff to successfully plead a *quid pro quo* claim.[7]

The Court should also explicitly reject the rationale that harassment perpetrated by an employee of supervisory rank is always *quid pro quo* harassment. To hold otherwise would preclude courts "from accounting for 'the circumstances of [each] particular case,' including the disparate corporate structures of modern business." *Jansen*, 123 F.3d at 518 (Coffey, J., concurring in part and dissenting in part) (quoting *Meritor*, 477 U.S. at 73). Imposing a higher standard of liability merely because an employee is designated as a "supervisor" disregards the varied roles of

---

[7] Employer liability for a supervisor's unrealized threat to do a "company act," even if effective in persuading the victim to acquiesce in a supervisor's sexual demands, should be analyzed differently. The rationale for this distinction is simply that in case of "threatened" *quid pro quo* harassment not reasonably observed by the employer, the machinery of the company is never invoked, and thus it cannot be argued that the employer has any reason to know of the supervisor's unrealized, coercive threat. *See Jansen*, 123 F.3d at 512-13. Thus although an instance of "threatened" *quid pro quo* harassment may constitute hostile environment harassment, it is not the kind of *quid pro quo* harassment that even arguably justifies the imposition of strict liability on employers under Title VII.

individuals denominated as "supervisors" in corporate America and fails to acknowledge that traditional labels such as "worker" and "manager" have diminished relevance in many American workplaces. *See generally* Fact Finding Report: Commission On The Future Of Worker-Management Relations 29-45 (Dep't Labor/Dep't Com. May 1994) (discussing shift in American workplaces from hierarchical management scheme to other organizational approaches that highlight both employee involvement and team-based management).

Harassment claims that do not constitute *quid pro quo* harassment under the above definition may constitute environmental harassment under Title VII. A particular case may also present elements of both *quid pro quo* and hostile environment harassment. *See, e.g., Jansen*, 123 F.3d at 493. But as long as courts rely on the classification of claims to determine the appropriate standard of employer liability, only vigilant attention to the analytical distinction between the two types of harassment will preserve *Meritor*'s prohibition on "automatic" employer liability in hostile environment cases.

II. COURTS SHOULD DETERMINE EMPLOYER LIABILITY FOR HOSTILE ENVIRONMENT CLAIMS UNDER A COMMON LAW NEGLIGENCE STANDARD

A. Application Of A Negligence Standard Is Consistent With *Meritor's* Title VII Analysis

This Court held in *Meritor* that Title VII does not impose automatic liability on employers for "hostile environment" sexual harassment committed by employees with a supervisory rank. *Meritor*, 477 U.S.

at 72. The Court's analysis in *Meritor* requires that any appropriate determination of employer liability for a supervisor's creation of a hostile environment focus on the employer's negligence, if any, in failing either to know of or to respond reasonably to harassment in the workplace.

Although the Court declined "to issue a definitive rule on employer liability" in *Meritor*, the Court provided several guideposts for determining the appropriate scope of employer liability for supervisor harassment. First, the Court determined that Congress intended courts to use common law agency principles as a guide in determining the scope of employer liability. *Id.* The Court disavowed, however, any notion that common law agency principles should be formalistically engrafted onto Title VII, stating that "common-law principles may not be transferable in all their particulars to [the] Title VII [context]." *Id.* Instead, the Court suggested that the analysis of employer liability should comport with "Congress' . . . intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*

Second, the Court identified several practical considerations that are "plainly relevant" to an analysis of employer liability for supervisor harassment. Among these factors are the employer's provision of both an adequate policy against discrimination and a grievance procedure "calculated to encourage victims of harassment to come forward." *Id.* at 72-73. The Court also held that a complaining party's "failure to invoke [the employer's] procedure" is also "plainly relevant" to the analysis of employer liability. *Id.* Finally, the Court suggested that an employer can insulate itself from environmental harassment liability if the employer fulfills its Title VII obligation to

institute "procedures . . . calculated to encourage victims of harassment to come forward" and the plaintiff either eschews those procedures or chooses to invoke them, and the employer responds adequately to the employee's complaint. *Id.* at 73. The Court's approach thus sensibly recognized that the conduct of *both* the employer and the plaintiff employee is relevant to a determination of employer liability under Title VII.

Meritor, and a decade of decisions by federal courts applying the *Meritor* analysis to myriad fact patterns, suggest a number of factors that may be relevant to determining whether an employer has acted reasonably to know about instances of harassment in the workplace and to remedy misconduct of which it was, or should have been, aware:

1. The existence of a clear policy denouncing sexual harassment; *see, e.g., Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997) ("[O]nce a company has developed and promulgated an effective and comprehensive anti-sexual harassment policy, aggressively and thoroughly disseminated the information and procedures contained in the policy to its staff, and demonstrated a commitment to adhering to this policy, it has fulfilled its obligation to make reasonably diligent efforts to 'know what is going on' within the company");

2. The existence of grievance procedures calculated to provide aggrieved employees with a reasonable avenue of complaint; *see, e.g., Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 110 (3d Cir. 1994) ("[W]e hold that an effective grievance procedure--one that is known to the

victim and that timely stops the harassment--shields the employer from Title VII liability for a hostile environment");

3. Reasonable dissemination of such policies and grievance procedures; *see, e.g., Gary,* 59 F.3d at 1398 (employer not liable where it "had pursued an active and firm policy against sexual harassment" and "had a detailed grievance procedure" for the processing and review of complaints);

4. Reasonable response to any complaints received, including adequate remedial action. *See, e.g., Knabe v. Boury Corp.,* 114 F.3d 407, 412 (3d Cir. 1997) (if investigation is undertaken, "employer cannot be held liable for the hostile work environment created by an employee under a negligence theory of liability unless the remedial action taken subsequent to the investigation is also lacking"); *Kilgore v. Thompson & Brock Management, Inc.,* 93 F.3d 752, 754 (11th Cir. 1996) (employer liable under Title VII only if employer "failed to take prompt remedial action after receiving notice of the alleged sexual harassment").

This is, of course, not an exhaustive list of the factors that may inform a court's analysis of employer liability for environmental harassment. Moreover, although none of these factors is likely to be dispositive in every case, *Meritor* indicates that employers who provide adequate procedures and mechanisms for addressing harassment in the workplace are not liable as a matter of law if plaintiffs fail to avail themselves of the procedures and the employer has no other avenue to know of, much less to address, an instance of workplace harassment.

B. Imposing Employer Liability Based On Common Law Agency Principles Other Than Negligence Is Contrary To *Meritor*

This Court held in *Meritor* that Congress intended courts to "look to agency principles for guidance" in determining employer liability under Title VII. *Meritor*, 477 U.S. at 72. Consistent with the Court's view of the appropriate role that common law agency principles should play in the determination of employer liability, the Court conducted a negligence-based analysis of the facts before it. *Id.* at 72-73.

Negligence, however, is only one of numerous common law bases on which "a master" was historically liable for the torts of "his servants." *See Restatement (Second) of Agency* § 219. Section 219 of the *Restatement (Second)* lists five bases for such liability including negligence.[8] Importantly, none of these "traditional agency principles" other than

---

[8] Section 219 of the *Restatement (Second)* provides:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences,

(b) the master was negligent or reckless,

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

negligence receives any attention in the *Meritor* Court's analysis. Indeed, *Meritor* contains no discussion of the *Restatement (Second) of Agency* at all.[9]

Some courts have nevertheless become so embroiled in a formalistic analysis of traditional agency principles that they have both failed to heed this Court's warning that those principles are not fully transferable to the Title VII context, and ignored the example of this Court's application of common law negligence principles to the facts presented in *Meritor*. The results have been confusing, and often inconsistent with this Court's teachings in *Meritor*, and with decisions reached by other courts on strikingly similar facts. As Judge Posner has observed, "judges can in good faith reach opposite results when they seek guidance in the *Restatement* to [determine] employers' liability for sexual harassment by supervisory employees." *Jansen*, 123 F.3d at 509 (Posner, C.J., concurring in part and dissenting in part) (citing *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997)).

In any event, because many courts have found confusion where the Court intended them to find guidance, it is helpful to address briefly the bases for liability articulated in section 219 of the *Restatement (Second)* to explain why agency concepts unrelated to negligence are not readily transferable to the specific

---

[9] *Meritor* relegates the importance of the *Restatement (Second) of Agency* to a "*see generally*" cite, *see Meritor*, 477 U.S. at 72, which means only that the "[c]ited authority presents helpful background material related to the proposition." *The Bluebook: A Uniform System of Citation* 23 (16th ed. 1996).

context of employer liability for environmental harassment under Title VII.

1. "Scope Of Employment" Liability Under Section 219(1)

The first stated conceptual basis of liability under section 219 -- that an employer is liable for the torts of its employees "committed while acting in the scope of their employment" -- is obviously ill-suited to the sexual harassment context. As the EEOC concedes, "[w]hen sexual harassment is intended solely to further private aims, rather than a purpose of the employer, it is outside the scope of employment." EEOC Br. 17 n.3. Many courts, including the Eleventh Circuit in this case, have recognized the self-evident proposition that sexual harassment is perhaps uniquely linked to "private aims." Pet. App. 12a ("This case provides the archetypical example of employees stepping outside of the scope of their employment and seeking to further personal ends."); *see also Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (holding that unlawful sexual harassment is an illegitimate activity, beyond the scope of the supervisor's employment). Even so, in the rare instances where the harasser acts under a belief that his harassment "further[s] a purpose of the employer," EEOC Br. 17 n.3, automatic employer liability under a "scope of employment" theory is unwarranted. Instead, courts can readily assess under a negligence standard whether the employer bears any culpability related to the harassment.

2. "Intended The Conduct Or Consequences" Liability Under Section 219(2)(a)

The second stated conceptual basis of liability under section 219 -- that an employer is liable if the employer "intended the conduct or the consequences" -- is

equally ill-suited for application to the sexual harassment context. Employers obviously do not rationally intend for sexual harassment to occur. To the contrary, employers are interested in maintaining productive work environments free from harassment of any kind. In any event, an employer that may be said to "intend" the "consequences" of sexual harassment by adopting an unreasonable approach to the unfortunate reality of sexual tensions and misconduct in the workplace would face Title VII liability under a negligence standard.

3. "Non-Delegable Duty" Liability Under Section 219(2)(c)

Another stated conceptual basis of liability under section 219 would hold an employer liable if a supervisor's creation of a hostile environment "violated a non-delegable duty of the master." Some commentators have suggested that this concept is transferable to the Title VII context on the theory that employers have a duty to keep their employees safe from a sexually hostile environment. *See, e.g.*, David B. Oppenheimer, *Exacerbating The Exasperating: Title VII Liability Of Employers For Sexual Harassment Committed By Their Supervisors*, 81 Cornell L. Rev. 66 (1995); Justin S. Weddle, *Note: Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty To Prevent A Hostile Workplace*, 95 Colum. L. Rev. 724 (1995). This view is an unabashed route to automatic employer liability for any workplace harassment and has no judicial adherents. Indeed, most courts do not analyze, if they even mention, the "non-delegable duty theory" of agency liability when analyzing employer liability for environmental harassment. *See*, *e.g.*, Pet App. 10a; *Bouton*, 29 F.3d at 106.

4. "Apparent Authority" and "Aided By The Agency Relation" Liability Under Section 219(2)(d)

Courts have summarized section 219(2)(d) as providing a basis of employer liability for environmental harassment when either the plaintiff "relied upon [the] apparent authority" of the supervisor to harass or when the supervisor's wrongful conduct was "aided by the agency relationship." *Bouton*, 29 F.3d at 106. This final conceptual basis of liability under section 219 has created the greatest analytical difficulty for courts and consequently caused the most mischief.

As an initial matter, common law agency principles such as "apparent authority" or "aided by the agency relationship" are terms suited to analysis of claims of *quid pro quo*, rather than hostile environment harassment. *See* EEOC Br. 15 ("supervisor [who] fires an employee because she refuses to submit to an advance . . . is necessarily aided in accomplishing the tort by the existence of the agency relation.") (internal quotation omitted); *see also* Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* 129 (1992) ("The essence of the *quid pro quo* theory of sexual harassment as a violation of Title VII is that someone relies upon his apparent or actual authority to extort sexual consideration from an employee.") (internal quotation omitted). Reliance on these common law agency principles to determine employer liability for environmental harassment blurs the analytical distinction between *quid quo pro* and hostile environment harassment and can result in the imposition of strict liability for environmental harassment in violation of *Meritor*. *See*, *e.g.*, *Karibian*, 14 F.3d at 78-81.

The common law concepts of "apparent authority" and "aided by the agency relationship" are hopelessly vague and only confuse the analysis of employer liability for environmental harassment. Thus, although some courts have correctly rejected the proposition that employees can reasonably believe that their supervisors have "apparent authority" to engage in harassing conduct, *see, e.g.*, *Jansen*, 123 F.3d at 548-50 (Coffey, J., concurring in part and dissenting in part); *Gary*, 59 F.3d at 1397-98, petitioner argues that a plaintiff's fear of a supervisor's "power" to retaliate *always* raises at least a jury question on whether the supervisor's "apparent authority" facilitated the harassment. Pet. Br. 22-24. At its extreme, this latter line of reasoning is an indirect route to strict employer liability for any supervisor harassment. At a minimum, this kind of reasoning mandates trial of every harassment allegation involving an employee of supervisory rank.

The inquiry whether a supervisor's harassing conduct was "aided by the agency relationship" proves similarly difficult to apply in practice. Most courts, and the EEOC here, agree that a supervisor is not "aided by the agency relationship" in accomplishing the hostile environment if the supervisor "simply takes advantage of his proximity to an employee in the same way that a co-worker would." EEOC Br. 18; *see also Gary*, 59 F.3d at 1396. Rather, as the court below held, the employer is liable under an agency theory "only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status." Pet. App. 13a & n.8 (citing the example from the *Restatement* comment that "a telegraph company may be held liable for a tort committed by a telegraph operator who sends a false telegraph message.").

Other courts have disagreed with the court below and employed a broad reading of "aided" in the common law rule. Under such an analysis, employer liability for supervisor harassment again becomes a foregone conclusion because, as petitioner describes it, supervisors are always aided in accomplishing harassment by the "implicit threats and obvious inherent dangers" that accompany the power structure of the supervisory relationship. Pet. Br. 24. This is precisely the kind of "automatic liability" rejected by the Court in *Meritor*.

A decade of post-*Meritor* caselaw shows that courts that mistakenly rely on agency principles other than negligence to determine employer liability for environmental harassment do so with one of two results, either of which is inconsistent with *Meritor*. Some courts, like the *en banc* court below, engage in a belabored and needlessly complicated analysis of traditional common law agency principles that ends up focusing on negligence anyway. Other courts focus on common law agency factors in a manner that blurs the distinction between hostile environment and *quid pro quo* harassment claims, often with the result of imposing strict liability on employers for hostile environment harassment. As the above analysis shows, the Court should explicitly reject common law agency theories other than negligence to analyze employer liability.

III. APPLICATION OF A NEGLIGENCE STANDARD IS CONSISTENT WITH TITLE VII

A negligence standard of employer liability for hostile environment harassment balances the goals embodied in Title VII without imposing liability on conscientious employers for their inability to eliminate

the social ill of sexual harassment from the workplace. Any higher standard of employer liability constitutes an unsubstantiated judicial extension of employer liability not contemplated by Title VII.

Amazingly, the EEOC justifies its support of a legal standard "imposing liability on employers for the acts of their agents without regard to employer fault" on the ground that such a standard will act as a "catalyst" for employers to "formulate the kind of hiring practices, training methods, review processes, complaint procedures, and disciplinary measures" to eradicate sexual harassment in the workplace (EEOC Br. 22). The Administration's uncharted "catalyst" approach is pure social engineering, unrestrained by the text of Title VII, the legislative history of the statute, or the Court's decision in *Meritor*.[10] Aside from whatever politically correct appeal might attach to the EEOC's endorsement of "a zero tolerance" approach to employer liability for sexual harassment, a negligence standard will achieve Congress's legitimate policy aims as reflected in Title VII.

As an initial matter, employers already have strong incentives to discourage sexual harassment in the workplace, among them that employers desire to maintain a productive workplace free from harassment of any kind. That legitimate employer interests have been at least seriously misunderstood is evidenced by the statement by Eleventh Circuit Judge Tjoflat that employers might rationally "opt" to conceal from its employees the identity of the individual to whom claims about violations of the employer's sexual

---

[10] That the government believes the standard it advocates comports with Title VII and this Court's directive in *Meritor* is testament to the need for clearer standards in this area.

harassment policy should be made in an effort to reduce the "cost of doing business." Pet. App. 37a (Tjoflat, J., concurring in part and dissenting in part). That statement ignores the realities of the litigation environment in which employers find themselves -- where more employment-related cases are being filed than ever before and courts are inexplicably more willing to find employers liable for unauthorized employee conduct even when an employer has "a model system" in place for addressing sexual harassment claims. *Id.*[11] In addition, even assuming employers could adopt an approach to workplace harassment that "yield[ed] more sexual harassment but less liability," *id.*, the non-litigation driven interests of employers -- such as the desire to foster a productive working environment that is conducive to attracting and retaining skilled workers in a shrinking labor pool -- would provide sufficient incentives for employers to take all reasonable steps to eradicate harassment from the workplace. Many employers thus already have the "zero-tolerance" approach to workplace harassment advocated by petitioner, but the expansive liability scheme endorsed by petitioner would penalize even these employers. Pet. Br. 20.

The EEOC Guidelines state that "[p]revention is the best tool for the elimination of sexual harassment." 29 C.F.R. § 1604.11(f). The EEOC guidelines recognize that even the most diligent employer cannot prevent all instances of workplace harassment, but must instead at times address such incidents after the fact by prompt remedial action. Thus, the EEOC Guidelines instruct employers to develop "appropriate sanctions" for

---

[11] Moreover, under current law in most circuits, employers face strict liability for *quid quo pro* sexual harassment claims.

inappropriate workplace conduct and to inform "employees of their right to raise and how to raise the issue of harassment under Title VII." 29 C.F.R. § 1604.11(f).

A negligence standard holds employers responsible for taking reasonable steps to prevent, to detect and to address sexual harassment in the workplace. A negligence standard also recognizes that a workable approach to preventing sexual harassment in the workplace must necessarily allocate to both employers and employees the responsibility to report and address instances of sexual harassment.

Imposing liability on employers who have taken reasonable steps to deter sexual harassment in the workplace is not contemplated by Title VII. Further, imposing a no-fault liability regime on employers -- either directly or through a convoluted and uncertain application of traditional agency principles -- will have negative consequences. "The imposition of liability beyond that which is likely to deter sexual harassment serves no constructive purpose and unnecessarily imposes costs on employers, costs that are ultimately passed on." *Jansen*, 123 F.3d at 498 (Flaum, J., concurring). Ultimately, these costs will be assessed against consumers and workers -- in the form of higher prices for the employer's products and lower wages. *See Jansen*, 123 F.3d at 510-11 (Posner, C.J., concurring in part and dissenting in part).

To the extent individuals conform their decisions to incentives created by the law, imposing no-fault liability on employers for environmental harassment may actually discourage reporting of sexual harassment complaints. If employers are liable for sexual harassment even if they had no knowledge of the harassment and no complaint was made, victims may

rationally choose not to use the employer's complaint process, but to sue instead, depriving the employer of the opportunity to remedy the situation promptly, to the benefit of all employees.

Finally, holding employers liable that have taken reasonable steps to deter sexual harassment in the workplace may also incentivize employers to take *unreasonable* steps to deter harassment. Such steps would not be cost effective in the traditional sense because they would impose extreme costs on employers (and consumers and workers) while achieving negligible deterrent effects. Such steps could also take the form of curtailing employee freedom, such as putting employees under constant video or audio surveillance. *Id.* at 511.[12]

Congress surely did not intend for Title VII to work such nonsensical results. To the contrary, Title VII reflects Congress' desire to avoid undue burdens on private businesses while at the same time accomplishing Title VII's ultimate statutory goals. *See, e.g., United Steelworkers of Am. v. Weber*, 443 U.S. 193, 207 (1979). For all of the reasons discussed above, a negligence standard of employer liability for hostile environment harassment best promotes the shared objectives of employers and Title VII with respect to sexual harassment.

---

[12] Even if employers were unlikely to resort to such lengths, a strict liability regime would likely result in more subtle workplace changes as employers may rationally decline to foster social interaction among employees.

CONCLUSION

The Court should affirm the *en banc* decision of the court below, which in effect employed a negligence analysis, and reaffirm the principle that employer liability for hostile environment sexual harassment should be determined by reliance on negligence principles.

January 28, 1998

Respectfully submitted,

Jan S. Amundson
Quentin Riegel
The National Association of Manufacturers
1331 Penn. Avenue, NW
Suite 600
Washington, D.C. 20004

Leslie Miller
Manufacturers Alliance for Productivity and Innovation, Inc.
1525 Wilson Boulevard
Suite 900
Arlington, VA 22209

William J. Kilberg
Counsel of Record
Douglas R. Cox
Rebecca A. Womeldorf
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae